really was the client and what was really asked of Coudert and all that sort of thing, which would come out in a trial or in discovery and then on summary judgment.

MS. FRIEMAN: We also think there's major issues as far as foreseeability and damages and things like --

THE COURT: Okay. But all of that --

MS. FRIEMAN: -- if what they're talking about is a negligence claim.

THE COURT: But here we're just on a 12(b)(6). So the issue is -- I mean I'll give you more time to brief this issue if you think it's worth doing on the issue of whether paragraph 36 sets forth, you know, a negligence claim for a motion to dismiss basis.

MS. FRIEMAN: Well, let me not turn down any offer and say that I will look into it and tell you it tomorrow by the --

THE COURT: Well, no, because I usually rule from the bench, that's the --

MS. FRIEMAN: Oh. In that case I'll sit down. Thank you.

THE COURT: All right. Okay. All right. All right. I'll take about five minutes and I'll be right back.

[Court recessed from 12:13 p.m. to 12:28 p.m.]

THE COURT: All right. I have before me an objection to a proof of claim, Claim No. 239, submitted by Statek

Corporation in this Chapter 11 case. The objection is brought by the plan administrator under the debtor Coudert Brothers LLP's Chapter 11 plan, which was confirmed some time ago and gives the administrator the authority to object to proofs of claim. The claim was originally filed on behalf not only of Statek but also Technicorp International II Inc. However, since that time I permitted the stay to be lifted, the automatic stay to be lifted for the claimants to amend the complaint against Coudert Brothers that underlies the proof of claim and that was attached to the proof of claim. That amended complaint deleted Technicorp International II Inc. as a plaintiff so that at this point Statek Corporation would be the only claimant.

As a proceeding involving the allowance or disallowance of claims, this is a core proceeding under 28 USC §157(2)(b). A claim objection is a contested matter under the bankruptcy code; however, as I informed the parties to this proceeding last week, given the nature of the claim I have incorporated under Rule 9014 the adversary proceedings rules to this claim objection. More specifically, I am treating this claim objection as a motion to dismiss under Federal Rule 12(b)(6) which is incorporated by Bankruptcy Rule 7012.

The parties had previously agreed to go to mediation on this claim, and I was informed after the mediation apparently had proceeded for some time that they believed that

certain issues that are addressed in this particular objection were issues that the parties believed should be addressed now and that the Court's review of those issues might well assist them in the successful completion of the mediation. That request also led me to treat this particular proceeding that's in front of me as one that I should decide under Rule 12(b)(6) in that it's clear that the parties have not completed discovery and that it would be extraordinary and I think improper to go beyond the 12(b)(6) framework in that context.

The Court when considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) must assess the legal feasibility of the complaint, in this case the claim, and not weigh the evidence that might be proffered or offered in its support. Koppel v. 4987 Corp., 167 F.3d 125, 133 (2nd Circ. 1999). The Court's consideration "is limited to facts stated on the face of the complaint and in the documents appended to the complaint or incorporated in the complaint by reference as well as to matters of which judicial notice may be taken." Hertz Corporation v. City of New York, 1 F.3d 121, 125 (2nd Circ. 1993). The Second Circuit recognizes incorporation by reference for contracts and/or agreements that are integral to the complaint even if they're not attached thereto for purposes of Rule 12(b)(6). See Chambers v. Time-Warner Inc., 282 F.3d 147, 152 (2nd Circ. 2002).

The Court accepts the complaint's factual allegations

as true even if doubtful in fact, and must draw all reasonable inferences in favor of the plaintiff. Tellabs Inc. v. Makor Issues and Rights Ltd., 127 S.Ct. 2499, 2509 (2007). However, if a claimant's allegations are clearly contradicted by documents incorporated into the pleadings by reference, the Court need not accept them. Labaho v. Best Buy Stores LP [Ph.], 478 F.Supp. 2d 523, 528 (S.D.N.Y. 2007). Moreover, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Instead the complaint must state more than labels and conclusions and a formulaic recitation of the elements of the cause of action will not do. Bell Atlantic Corporation v. Twombly, 127 S.Ct. 1955, 1965 (2007). Thus while the Supreme Court has confirmed in light of the notice pleading standard of Federal Rule of Civil Procedure 8(a), when a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007), to survive a motion under Rule 12(b)(6) a complaint's "factual allegations must be enough to raise a right to relief above the speculative level" Bell Atlantic, 127 S.Ct. (1964). Where the claim would not otherwise be plausible on its face therefore, the complaint must contain sufficient additional factual allegations to "nudge the claim across the line from conceivable to plausible" Id. at 1974. Otherwise the defendant, in this case the debtor, should not be subjected to

the burdens of continued discovery and the worry of overhanging litigation. Id. At 1965-67. See also Benjamin v. Whitman, 523 F.3d 119, 129 (2nd Circ. 1989) and Iqbal v. Hasty, 490 F.3d 143, 157-58 (2nd Circ. 2007), cert. granted 2008, U.S. LEXIS 4906 (June 16, 2008), which stand for the proposition that to survive a Rule 12(b)(6) motion after Bell Atlantic a complaint must "amplify a claim with some factual allegations and those contexts where such amplification is needed to render the claim plausible."

In addition to objecting to Statek's claim on the merits under Rule 12(b)(6), the plan administrator also objects on the basis that the claim is time barred under New York's borrowing statute as well as, if that borrowing statute does not apply, the applicable statutes of limitations. A statute of limitations defense can be raised under Rule 12(b)(6) but the circumstances under which it may be raised are limited by the nature of a 12(b)(6) objection. Normally a lapse of a limitation's period is an affirmative defense the defendant must plead and prove. Staehr v. Hartford Financial Services Group, Inc., 547 F.3d 406, 425 (2nd Circ. 2008). However, "a defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint, Id. citing McKenna v. Wright, 386 F.3d 432, 436 (2nd Circ. 2004). For the circumstances under which an affirmative defense may be raised in addition to it appearing on the face

of the complaint, see generally 5 Wright & Miller Federal Practice and Procedure Section 1357. A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6). Since Rule 9(f) makes averments of time material, the conclusion of dates in the complaint indicating that the action is untimely renders it subject to dismissal for failure to state a claim."

Of course the defendant moving in a 12(b)(6) posture "must accept the more stringent standard applicable to this procedural route." Not only must the facts supporting the defense appear on the face of the complaint, but as with all Rule 12(b)(6) motions the motion may be granted only where "it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." McKenna, 386 F.3d at 436.

Here, as I noted, the plan administrator objects to Statek's proof of claim as set forth in the amended complaint which they filed on August 29, 2008, on both the merits as well as on grounds of untimeliness. The nature of the claim was clarified and reduced or minimized in Statek's response to the plan administrator's objection. The complaint itself has one asserted cause of action headed with the caption breach of

professional and fiduciary duties. The response by Statek as well as Statek's counsel's presentation today at this hearing had made it clear that at this time and going forward the only breach of a fiduciary duty that Statek asserts is "Coudert's relatively minor failure to account for its $43,557.47 disbursement of Statek funds out of its U.S. dollar account. Statek does not claim that Coudert intentionally withheld files from Statek in breach of its fiduciary duty to provide them." That's found at page 42 of Statek's memorandum of law in opposition to this claim objection.

Thus, at this time Statek has reduced its claim to one for breach of care, malpractice or negligence, all stemming from the following fact pattern. As alleged in the complaint or the amended complaint, Statek and its parent TCI-II were originally under the control of an individual named Hans Frederick Johnston as well as his associate Sandra Spillane. They assumed the position of Statek's and TCI's directors and were in control of those corporations. They allegedly, according to the complaint, retained Coudert Brothers LLP through its UK office for certain legal services which Coudert billed to Statek. [**2:15:18 audio skips**] with an interest asserted in the ownership and control of Statek and TCI-II asserted in Delaware Chancery Court those interests and eventually obtained a determination by the Delaware Chancery Court pursuant to §225 of the Delaware General Corporation Law

that indeed Johnston and Spillane were not the lawful directors of TCI-II and that instead they should be replaced.

Upon their replacement two things occurred. First, in and around June 26, 1996, Statek and TCI commenced a second action in Delaware State Court against Johnston, Spillane, and entities owned or controlled by them asserting claims of fraud, breach of fiduciary duty, and corporate waste. Secondly, in or around July of 1996 Statek through its counsel -- actually starting in January of 1996 Statek through its counsel sought from Coudert certain information from Coudert and instructed Coudert not to transfer any funds that it was holding for Statek without proper authorization, having informed Statek of the first ruling in the §225 action. Then in July of 1996 Statek again notified Coudert that it had commenced the fraud and waste action and, as set forth in paragraph 28 of the amended complaint, "asked Coudert to provide information and a complete copy of the files arising out of and relating to the services Coudert had rendered," which the complaint defines as the Statek files.

The complaint asserts that Coudert provided information to Statek including sending Statek six files related to the services it had rendered in setting up a subsidiary known as Statek Europe Limited and in assisting with a lease and operation of an apartment in London that was used by Johnston. Paragraph 30 of the complaint states that Coudert

confirmed that it had no other Statek files or information about other Statek services it had rendered. The complaint then states that, contrary to the confirmation it provided to Statek, Coudert in fact had additional "Statek files" and information of other "Statek services it had rendered," including the four types of services listed in paragraph 31 which included involving setting up an asset protection trust in the Jersey Channel Islands used by Johnston and Spillane, assistance in setting up a bank account and arranging for safe deposit boxes in the name of one of the asset protection trusts, advice relating to a house in Nassau, Bahamas, that Johnston and Spillane had purchased, and advice and assistance relating to purchasing, shipping and storing art and stamps that Johnston and Spillane acquired using funds misappropriated from Statek.

The complaint asserts that this information was subsequently provided to Statek over the course of time. Paragraph 36 of the complaint states that "for reasons unknown to Statek or to the plaintiff Coudert did not provide Statek with complete and accurate information about the Statek services or the contents of all of its Statek files, either when first requested in July 1996 or at any time since."

The complaint goes on to state that after obtaining a judgment in the fraud and waste action in September of 2000 after a lengthy opinion was issued by the Delaware court in

that action on May 31, 2000, Statek pursued its remedies against Johnston and Spillane and their entities. The May 31, 2000 opinion, as quoted in paragraph 18 and 19 of the amended complaint, noted "the task of proving those diversions of funds was daunting because many of the expenditures were either inadequately documented or not documented at all, and further that Mrs. Spillane moved money in huge amounts to Johnston entities and back to Statek and back out of Statek with the elan and skill of a drug cartel consigliore. This money moves at the speed of light and in huge amounts." Again that's a quote from the Delaware decision from May 31, 2000, and that appears at paragraph 21 of the complaint.

Statek alleges that it pursued the collection of this claim in various ways, which included commencing an insolvency proceeding against Johnston in the Supreme Court of the Judicature of England and Wales pursuant to the 1986 Insolvency Act. The complaint then goes on to say that after that involuntary petition was filed on or about July 11, 2002, an English trustee was appointed and that after his appointment on October 2, 2002, he by letter dated November 4, 2002 -- I'm sorry, by letter dated October 22, 2002, to Coudert the trustee sought files and documents from Coudert related to Johnston and to any assets that should be included in Johnston's bankruptcy estate. That led, as set forth in the complaint, to a back and forth between Coudert and bankruptcy trustee with regard to

whether Coudert had any additional information to that which had been previously provided to Statek. But ultimately, after the trustee commenced an ancillary bankruptcy proceeding under Bankruptcy Code 304 in the United States the Bankruptcy Court for the District of Connecticut, the trustee obtained additional information in addition to information provided by Coudert on November 4, 2002, which revealed that it had information concerning an art collection that Mr. Johnston wanted to bring to Europe.

In response to that November 4th production, on December 12, 2002, the trustee wrote to Coudert and stated "it is my understanding that you assisted the bankrupt with numerous affairs, and I shall therefore be grateful if you would provide me with copies of your fee notes in relation to the bankrupt and Statek in order that I can establish the exact nature of the advice provided." And then again when the trustee felt that he was frustrated by Coudert in that matter, he started in June of 2003 the ancillary proceeding in Bankruptcy Court here in Connecticut and obtained additional information from Coudert in that context including Coudert's assistance in setting up the Channel Islands trust.

Based on all of the foregoing, Statek alleges that Coudert breached its professional duty of care by failing to provide Statek with all of the "Statek files," failing to disclose to Statek all of the information of which it was aware

about Statek's matters and "the Statek services," and failing to account for Statek's funds that it disbursed from its accounts. Statek contends that it was damaged by that failure to provide files and information, and that it delayed the time when Statek could obtain or recover or discover assets that Johnston and Spillane had misappropriated from Statek, and increased the cost to Statek in recovering such assets to the extent that they were recoverable. Based on all the foregoing, the proof of claim asserts a claim of $85 million.

On the merits the plan administrator contends that the foregoing recitation of facts, which I believe is encapsulated in paragraph 36 of the complaint, which again states "for reasons unknown to the plaintiff Coudert did not provide Statek with complete and accurate information about the Statek services or the contents of all of its Statek files either when first requested in July 1996 or any time since." It fails to state a claim for professional malpractice or negligence.

The basis for the claim or the underlying claim, as I stated, was somewhat uncertain until clarified first in Statek's response to the claim objection as well as on the record. The focus appeared to be on breach of fiduciary duty, and even after the clarification in the memorandum and response to the claim objection Statek relied upon an English decision, Bristol and West Building Society v. Mothew, 1998, Ch 1, Ct. of

Appeal, where professional negligence was conceded by the defendant.

On that basis and based on the lack of any assertion of any negligence per se or explicitly in the complaint, the plan administrator contends that pursuant to the 12(b)(6) standard that I outlined Statek has not asserted a claim for negligence or professional malpractice. It is the case, however, that the labels or conclusions that a complaint puts on the facts asserted therein are of no import and that the Court needs instead to review the factual assertions set forth in the complaint to determine whether the complaint states a claim.

I have noted that it is not clear to me from the face of the complaint what exactly the complaint means by the phrase Statek files or the phrase Statek services, whether, for example, that phrase encompasses not only files of Statek and services provided to Statek but also includes files of Johnston and Spillane individually or of their other entities and services provided to Johnston and Spillane individually. However, it does appear to me from the face of the complaint that the complaint does allege that Coudert provided services to Statek, although it does not specify what those services were, and that the defined terms Statek services and Statek files could be read to include services to Statek and files of Statek.

Given that and given the allegation in the complaint that notwithstanding a request by Statek for return of such files and information pertaining to such services, I believe that the complaint does state a claim for negligence in that it appears that such files and information was in Coudert's possession and was not, when the request was made, returned to Statek but rather was only discovered and returned later in 2002 and 2003. It is conceivable certainly that such files and such information were not Statek's own files or information pertaining to a Statek representation by Coudert, and consequently that Coudert did not have an obligation under its professional duty of care to its client Statek to provide such files and information to Statek. It's also possible that Coudert was not negligent in doing so, even if they were Statek's files and information pertaining to Statek's -- or to services provided to Statek by Coudert. But I believe those issues are issues that are properly decided after a proper evidentiary record has been developed and not on a motion to dismiss basis.

It is also asserted by Statek that the relatively minor amount of $43,557 was lost by Coudert not only as a result of its negligence but also based on an asserted breach of fiduciary duty. However, from the face of the complaint I can see no basis for a breach of fiduciary claim as asserted in the complaint with regard to such funds and Coudert's failure

to turn over such funds. So on the merits, Coudert's motion to dismiss is denied insofar as the professional malpractice and/or negligence claim but granted with regard to the remaining breach of fiduciary duty claim which pertains to the roughly $43,000 of funds that were not retained by Coudert that were Statek's funds.

The plan administrator is also, as I noted, objecting to the claim on the basis that it's time barred, there are two underlying grounds for this objection.

First, the plan administrator contends that the claim is time barred by the operation of New York's borrowing statute which appears at New York CPLR Section 202. Statek acknowledges or concedes that if New York law applies to this matter that it is time barred.

In addition, even if for some reason the New York borrowing statute does not apply, the plan administrator contends that under applicable choice of law principles and the applicability of the relevant statutes of limitation the claim would also be time barred. Again, Statek concedes that if New York law applies, New York underlying substantive law applies here, that the claim would be time barred. It also concedes at Page 45 of its memorandum of law that if California law applies here, its claim would be time barred. It disagrees with the plan administrator that if Connecticut law applied it would also be time barred with respect to this claim on the merits

and also it disagrees with the plan administrator's contention that if English law applies the claim would be time barred.

The first issue to decide here is whether the application of the choice of law determination the Court should apply New York law in respect of choice of law or alternatively, whether it should apply some other choice of law principle, mainly federal choice of law principles. That issue applies both to whether the Court should apply the New York borrowing statute which requires no choice of law analysis to be applied as well as whether if the borrowing statute is not applied and not effective for some reason the Court should apply New York choice of law principles on the underlying statute of limitations question or federal choice of law principles.

The underlying jurisdictional basis for this claim is the Court's bankruptcy jurisdiction under 28 USC Section 1334. The claim here is related to the bankruptcy case and that it is a claim asserted against the debtor. As I noted before, the Court's determination of that claim is a core matter and core proceeding under Section 128 USC 157(a)(2)(B).

It has long been the rule that in cases based upon diversity of citizenship where the Federal Court's jurisdiction is based on diversity that the Federal Court must decline the choice of law or state conflicts rules are the state in which it sits as set forth in Klaxon v. Stentor Electric

Manufacturing Company, Inc., 313 US 487, 496 (1941). The original basis for this claim was in fact diversity as originally filed before the complaint was amended. It was brought in the district -- well, it was removed from the District Court of Connecticut, Statek being a California Corporation and Coudert being a New York LLP. As the Supreme Court in the Klaxon case said other than applying the choice of law rules at the state at which the Federal Court sits would mean that, quote, "The accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."

MR. RITT: Your Honor, if I may just -- I don't want to interrupt you but to make sure the record is correct, there was no diversity of jurisdiction in Connecticut. We filed in the Superior Court. It was removed on --

THE COURT: Oh, it was removed because of the bankruptcy?

MR. RITT: But it was about to be remanded on the bankruptcy proceedings.

THE COURT: All right. You're right. You're right. In any event, the principle of Klaxon is that the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side and that any other ruling would do violence to the principle of uniformity within a state. The

Supreme Court had concluded that the application of the choice of law determination was a matter of substantive laws as the law covered by Erie v. Tompkins.

However, as I noted, the basis for this Court's jurisdiction is 28 USC Section 1334 and the underlying core function of the Bankruptcy Court to determine the allowance or disallowance of claims against the debtor. Although there had been dicta in the Second Circuit dating back to the Kalb, Voorhis & Company v. American Financial Corporation case, 8 F.3d 130, (2d Cir., 1993) and even before then to the Koreag, Controle Et Rivision SA case, 961 F.2d 341, 92d Cir., 1992). The Second Circuit did not directly address whether it would apply Klaxon and Erie to determinations by a Bankruptcy Court exercising bankruptcy jurisdiction until it did so in another law firm bankruptcy In re Gaston and Snow, 243 F.3d 599 (2d Cir., 2001). In that case there was no basis for federal jurisdiction in the Bankruptcy Court but for the fact that Gaston and Snow's Chapter 11 case was pending there and the defendant in that case's voluntary submission to the in personam jurisdiction of the Court.

As is asserted in this case, in Gaston and Snow, New York's borrowing statute, CPLR Section 202, would be dispositive or determinative on the ability of the action to continue if it applied. Other than the fact that the case was pending in New York as a result of Gaston and Snow's

bankruptcy, New York choice of law principles would not call for the application of New York law given the interest of the parties. Gaston and Snow was a Massachusetts law firm with only a branch office in New York and the wrong, if it occurred, occurred in either Massachusetts or Utah where the defendant resided.

The Court of Appeals considered again whether the borrowing statute should apply as would be required under Klaxon or instead whether it should apply as urged by the defendant in that case a federal choice of law analysis which would have led to the borrowing statute not applying.

It was argued to the Second Circuit consistent with some case law in other jurisdictions including In re Lindsay, 59 F.3d 942 (9th Cir., 1995) and In re SMEC Inc., 160 B.R. 86 (MD Tenn. 1993) that there was a distinction between Klaxon and the Court's bankruptcy jurisdiction that should require a uniform federal choice of law analysis.

Notwithstanding those arguments, the Second Circuit concluded to the contrary that the logic and policy underlying Klaxon should apply where the Court was exercising its bankruptcy jurisdiction, and therefore, that the Court in this case, in the Gaston and Snow case, the District Court exercising bankruptcy jurisdiction should apply the law of the state in which it sits.

The Second Circuit I believe fully considered policy

arguments to the contrary including arguments raised by Statek here that there is potential for forum shopping that would arise from the application of Klaxon in such a context and similarly that because the Bankruptcy Court is dealing with claims filed into it from all occasions that a uniform rule should apply under federal law.

The Court noted that given that it was being asked to apply federal choice of law principles it needed under the Supreme Court jurisprudence to apply such federal law principles only in those few and restricted incidences where, quote, "A significant conflict between some federal policy or interest and the use of state law must be first specifically shown." See O'Melveny & Meyers v. FDIC, 512 U.S. 79, 87 (1994), and Atherton v. FDIC, 519 U.S. 213, 218 (1997).

The Second Circuit found no such federal policy or interest here given that the underlying claim was a state law claim and could have been brought on diversity grounds -- I'm sorry, even though it could not have been brought on diversity grounds. The Court relied upon, again, the notion that this was an underlying non-bankruptcy claim, and therefore, found no overriding federal interest. It contrasted the situation that it faced with the facts in Vanston Bondholders Protective Committee v. Green, 329 US 156 (1946) where such a federal interest existed given the Bankruptcy Act of 1898's treatment of the claim at issue in Vanston which overrode the applicable

non-bankruptcy law.

In addition to the arguments that were specifically made and rejected by the Second Circuit in Gaston and Snow, Statek makes two other arguments here premised upon a distinction between the facts in Gaston and Snow and the present facts. Gaston and Snow was a collection action in an adversary proceeding by Gaston and Snow's trustee of a bill, although it is mentioned in the case that there was a counterclaim by the former client. The action here is a claim rejection where I've applied the adversary proceeding rules but the Court is again exercising its core function in determining the allowability of a claim. Relying largely on language in Vanston, the claimant here suggests that the federal policy in having a uniform approach to choice of law in claim objection situations is stronger than in the adversary proceeding collection action in Gaston and Snow. It also relies upon the Supreme Court's ruling in Katz to argue that the Supreme Court has since the Gaston and Snow reaffirmed and strengthened the concept and importance of a uniformed administration of the bankruptcy laws.

I do not believe, however, that the dicta in Vanston or the holding in Katz would result in any change of the present facts from the result in the Gaston and Snow case.

First, again, the Vanston case is I believe properly viewed as preemption case where there was clearly a strong

federal interest in applying federal law to all of the aspects of the determination of the allowability of post petition interest for a claimant given that the bankruptcy code in effect at the time, which was the Bankruptcy Act of 1898, disallowed claims for post petition interest by unsecured creditors with a Judge-made exception in instances where the debtor proved to be solvent. To my mind, since the Bankruptcy Act had a specific provision dealing with that specific claim, it was not a claim decided by applicable non-bankruptcy law, and therefore, federal law should govern.

Similarly, the equitable subordination action in In re Lois/USA, 264 B.R. 65 at 90 (Bankr. SDNY 2001) involved a specific provision of the Bankruptcy Code Section 510(c), which by its very nature is a federal statute, would set forth a federal purpose which would require the uniformity and interpretation.

I also do not believe that the holding in Central Virginia Community College v. Katz, 546 US 356 (2006) expanded the concept of the need to apply uniform bankruptcy law, or bankruptcy law uniformly to cover the applicable choice of law when one is dealing with an underlying claim based upon and governed by non-bankruptcy law. In Katz, the issue was whether the bankruptcy clause in Article 1, Section 8 of the constitution which gave congress the power to establish uniform laws pertaining to bankruptcy would trump a state's assertion

of sovereign immunity. Again, the issue was to my mind a preemption issue where a clear federal interest expressed in the bankruptcy clause butted up against a state interest consistently again since this claim objection, as is the case with most claim objections, is one that is not subject to specific provisions of the Bankruptcy Code that as a matter of federal law limit the claim such as Section 502(b)(6) or Section 502(b)(2) or Section 510(c), but is rather one to be determined on underlying non-bankruptcy adherence. It appears to me that there's no overriding federal interest that would rise to the level required by the O'Melveny and Meyers and Atherton cases.

The claim here could have been brought outside of bankruptcy, i.e., if this bankruptcy had not intervened in any number of forums. It could have been brought in New York, it could have been brought on the State of Connecticut, it could have been brought in England, it could have been brought in California in each case assuming that there was a basis for an in personam jurisdiction as well as the diversity which would have existed in each one of those forums. But given the fact that Coudert's bankruptcy is here in New York, I believe that it is consistent with Klaxon as per the logic of the Second Circuit in Gaston and Snow that this Court should apply New York's choice of law rules.

The issue of whether there's any taint of forum

shopping in applying those rules I believe is as much of a red herring here as it was in the Gaston and Snow case. Coudert was a New York LLP with its primary office in Manhattan. Clearly, the venue of this Chapter 11 case is therefore appropriate. Moreover, I can take judicial notice of the multitude of claims asserted against Coudert which would lead me to conclude that Coudert's Chapter 11 filing in Manhattan was not motivated by trying to obtain a favorable statute of limitations.

Therefore, I do not believe that Gaston and Snow is distinguishable or that it should be viewed in a different light and subject to reconsideration or it would ultimately be reversed in light of the Katz case. As the plan administrator points out, subsequent to the Katz determination Courts sitting in bankruptcy or applying their bankruptcy jurisdiction have continued to apply the choice of law principles of their forum state in the Second Circuit. See Bondi v. Grant Thornton International, 2007 US Dist. Lexis 11767 (SDNY Feb. 22, 2007) and In re Enron Corporation, 357 B.R. 3252 (Bankr. SDNY 2006).

Given that legal conclusion that I should look to New York law on choice of law matters, I conclude, as did the Court in Gaston and Snow, that CPLR 202, New York's borrowing statute, applies. It applies as drafted even if under New York choice of law principles, New York choice of law would generally lead to another state's or nation's choice of law

being applied for other purposes, In re Gaston and Snow, 243 F.3d at 608. See also Ledwith v. Sears Roebuck & Company, Inc., 660 NYS2d 402, 406 (AD 1st Dept 1997) and Gorlin v. Bond Richman & Co., 706 F. Supp. 236, (SDNY 1989). See also Baena v. Woori Bank, 2006 US District Lexis 74549 (SDNY Oct. 11, 2006).

Since as applied to the facts here the shorter limitations period under New York law applies it's conceded that that limitations period would defeat the claim, the objection is granted on a 12(b)(6) basis based on the applicability of New York CPLR Section 202.

The debtor has also argued, the plan administrator has also argued that even if I did not apply the New York borrowing statute and did apply either New York or federal choice of law principles, the applicable law that I would come up with would be one where the underlying claim would be time barred as well. Notwithstanding my application of CPLR 202, I've considered that argument also. Considering Section 142 of the Restatement Second, Conflicts of Laws which Statek relies upon as being a basis for federal choice of law principles, it appears to me that the New York limitations should apply here as well. That section says that, "Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in Section 6. In general, unless the exceptional circumstances of the case make

such a result unreasonable, 1), the forum will apply its own statute of limitations barring the claim," which as I've noted above would be the case here under New York Law. "The forum will apply its own statute of limitations permitting the claim unless maintenance of the claim would serve no substantial interest of the forum; and the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties." Therefore, that alternative would not apply.

Comment F to that rule states, "There will be rare situations when the forum will entertain a claim that is barred by its own statute of limitations but not by that of some other state. Thus, the suit will be entertained when the forum believes that under the special circumstances of the case, dismissal of the claim would be unjust. This may be so when through no fault of the plaintiff an alternative forum is not available as, for example, where jurisdiction cannot be obtained over the defendant in any state other than that of the forum, or where for some reason the Judge maintained that any other state having jurisdiction would be unenforceable elsewhere."

As I've stated, I believe that these principles, which are extraordinary ones, would not apply here under the Gaston and Snow case. However, I do have the belief that if for some reason the New York borrowing statute did not apply

under New York choice of law principles, which I believe under Gaston and Snow are the proper principles to apply, the paramount interest of England in regulating English attorneys and malpractice claims against English attorneys, and here again the attorneys who allegedly committed the malpractice and/or negligence where English solicitors would override the normal New York choice of law analysis, that normal analysis would look at primarily the place of the wrong and the -- or the locus of the tort and the location of the parties. See Krock v. Lipsay, 97 F.3d 640, 645 (2d Cir. 1996). Here, the injured party being California Corporation and the debtor being a New York LLP, it appears to be under the general New York choice of law rules, one would apply non-English law as sought by the claimant but California law.

But there is an exception I believe under the New York jurisprudence in R2 of New York's interest analysis which deals with malpractice claims against attorneys where the state where the attorneys are licensed and are practicing has a paramount interest at regulating the conduct of its own attorneys. See Diversified Group, Inc. v. Daugerdas, 139 F.Supp.2d 445, 453 (SDNY, 2001), as well as LNC Investments, Inc. v. First Fidelity Bank NA, 935 F.Supp. 1333 (SDNY 1996). See Engelke v. Brown, Rudnick, Bertack, Israels, LLP, 824 NYS2d 753 (Sup. Ct. NY County 2006) which was reversed on other grounds at 845 NYS2d 260 (AD 1st Dept. 2007).

Based on that analysis it would appear to me that English law should govern if one gets to the merits including the subsequent choice of law analysis. Again, as stated in Ledwith and Gaston and Snow, that choice of law analysis does not pertain at all to whether the borrowing statute applies since that statute applies at all times given that I said in New York.

Under English law, the plan administrator contends that this claim is time barred. There is, however, a statutory exception to the six year statute of limitation running from the date of the injury which would be in 1996 and clearly would result in barring the claim here. That is the limitation at Section 14 of 1980 which provides in Section 14(a)(5) -- I'm sorry, 14(a)(4) that the limitation period shall be either six years from the date on which the cause of action accrued or (b) three years from the starting date as defined by Subsection 5 below if that period expires later than the period mentioned above, i.e., the six-year period. The starting date is as set forth in Section 5, Section 14(a) of the Limitation Act of 1980. The earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. Then Sections 6 and 7 continue. The knowledge required for bringing an action for damages in respect of the

relevant damage means knowledge both of the material facts about the damage in respect of which damages are claimed and of the other facts relevant to the current action mentioned in Subsection 8 below. Subsection 8 states the other facts referred to in subsection (6)(b) above are that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

This act was the subject of a lengthy series of opinions by the House of Lords that appeared in Haward v. Fawcetts, (2006) UKHL 9, (2006) 3 All ER 497 (Mar. 2006). In those opinions the Court interpreted the extent of knowledge of both damages and the other circumstances required by Section 14(a) before the starting date accrues and based on my reading of the various opinions that appear at that citation I take a restrictive view of Tolden [Ph.]. As stated by Lord Nicholls of Birkenhead, knowledge for purposes of the statute does not mean knowing for certain beyond possibility of contradiction, it means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim for the proposed defendant, taking advice, and collecting evidence. Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to begin to investigate further. It is not necessary for the claimant to

have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularized statement of claim.

Moreover, as stated by Lord Brown of Eaton-under-Heywood, he asks is it enough that Mr. Heywood knew, as plainly he did, that Fawcetts, the defendant, advised him that this was a sound and suitable investment and that it was on the basis of this advice that he went ahead with it, or did he need to know more than that, and if so, what more? Clearly, for time to start running he did not have to know that Fawcetts had as a matter of law acted negligently in the giving of their advice. On the facts of this case the question only seems to me to come down to this, to set time running that Mr. Heywood need to know not only that the investment was made on Fawcetts' advice, but also that the advice had not been based on the kind of investigations which much necessarily be undertaken before any such advice can be reliably tendered. To my mind it must fail if anything more is required than that Mr. Heywood knew that his loss might well have resulted from an investment made on Fawcetts' advice. That is the plaintiff's knowing that he had suffered the relevant damage by the material date, Fawcetts' advice was more than merely the sine qua non of that loss.

As may have been suggested by my questions at oral argument, given what the new members of the Statek board and Statek itself knew in 1996 about the fact that Johnston and Spillane were sophisticated diverters of funds and further that

Coudert had been advised that including irrespective setting up foreign subsidiary and buying an apartment London it is very tempting, even on a motion to dismiss, to conclude that under the interpretation of the tolling provision of the British Limitations Act of 1980 that the starting time occurred in and around 1996, the date that Coudert allegedly was negligent and not a later date when it was conclusively established that Coudert had not provided all of the files and information that was requested in 1996. I say that also because the complaint itself notes that the trustee appointed in Mr. Johnston's English bankruptcy case almost immediately started to pursue discovery first informally and then formally of Coudert after his appointment.

However, I believe that on a motion to dismiss that inquiry is precluded. Again, see McKenna, 386 F.3d 436, and should await further factual development based upon what was known. Although I do believe it's very clearly something that would be the subject for a motion for summary judgment.

So again, the only basis in this procedural posture for dismissing the negligence claim as well as the -- and that would include a negligence claim with respect to the 40 some thousand dollars, $43,000.00, would be based upon the applicability of the New York borrowing statute.

So counsel for the plan administrator should submit her order consistent with that ruling.

As I usually do when I give a lengthy bench ruling, I will go over the transcript. I'm sure there are parts of it that I will correct not only for the inevitable typos and misspellings of case citations, but also for my grammar and the like. If I do make changes like that, I'll mark up the transcript and separately file it as an amended bench ruling. But the gist of the ruling won't change.

MS. FRIEMAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. RITT: Your Honor, may I ask for one point of clarification for the record?

THE DEFENDANT: Sure.

MR. RITT: I think when we talked about the legal standard for a motion to dismiss and Your Honor read the standard it was that the limitation defense is appears beyond doubt and there's nothing more that could be done by way of pretrial discovery or trial that would change that.

THE COURT: Right.

MR. RITT: Is Your Honor making a factual determination that there is no retainer agreement with a choice of law provision?

THE COURT: No, but I'm glad you asked that. As I read Gaston and Snow and the Ledwith case, the borrowing statute applies notwithstanding a choice of law analysis. So I'm not dealing -- the issue of whether there's a retainer

agreement would not enter into that aspect of the determination. So I'm not making a finding that there's no retainer agreement.

MR. RITT: So the basis is that the ruling in Gaston and Snow is that assuming there were a choice of law agreement that would otherwise be enforceable, that's somehow trumped by the borrowing statute?

THE COURT: Correct.

MR. RITT: Thank you, Your Honor.

THE COURT: As Ledwith says, modern choice of law decisions are simply inapplicable to the question of statutory construction presented by CPLR 202. CPLR 202 is to be implied as written without [inaudible] to conflict of law analysis.

MR. RITT: I agree, Your Honor. I don't think the issue is before the Court as to whether there is an enforceable contract. Ordinarily the analysis looks first to see whether the parties agree and the general rule is I believe that if that agreement doesn't violate somehow a fundamental policy of the forum state then the Court will enforce the parties' agreement.

THE COURT: Well, my reading of Gaston and Snow and the cases that cite it say that the borrowing statute --

MR. RITT: Applies.

THE COURT: -- applies, right.

MR. RITT: If there is New York law to the contrary -

-

THE COURT: You could raise it to me.

MR. RITT: I think we'd ask for an opportunity to do that --

THE COURT: Well, you can always make a motion. I mean obviously it wasn't in the briefs, but you can make that motion.

MR. RITT: Well, that's true, Your Honor, in the sense that we -- I think it's also the rule under Rule 12 which was not what we had thought about when we drafted the complaint that you don't anticipate any affirmative defenses, and therefore, we didn't have to anticipate that they would raise limit --

THE COURT: No, Rule 12 permits one to raise -- all right. Never mind. You can make the motion to reconsider.

MR. RITT: I appreciate that, Your Honor.

THE COURT: Okay.

MR. RITT: Thank you.

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Sally Reidy

Dated: May 28, 2009

# EXHIBIT B

**Ritt, Kenneth W.**

**From:** Karen Frieman [KFrieman@sterntannenbaum.com]
**Sent:** Monday, December 08, 2008 9:50 AM
**To:** Ritt, Kenneth W.
**Subject:** Statek v. Coudert

Document.pdf (110 KB)

Ken,

I realized that I failed to enclose the referenced documents with my letter to you of December 4. They are attached hereto. Please note that my letter mistakenly identifies the proper Bates Nos. of those documents. They are numbered STB 000588-593.

I apologize for any inconvenience.

Karen S. Frieman, Esq.
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kfrieman@sterntannenbaum.com

# EXHIBIT C

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February 19, 2009

BY FEDERAL EXPRESS
Kenneth W. Ritt, Esq.
Day Pitney LLP
One Canterbury Green
Stamford, CT 06901-2047

**Re: In Re Coudert Brothers LLP**
**Statek Corporation v. Coudert Brothers LLP**

Dear Ken:

As you know, we have been continuing our efforts to insure that all documents have been searched for and produced. To that end, kindly find enclosed documents bearing Bates Nos. STB00597-929 which were recently located.

Very truly yours,

Karen S. Frieman

cc: Lawrence W. Pollack, Esq.

{00006744.DOC v}

# EXHIBIT D

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**From:** Carroll, Paul [IMCEAEX-_O=COUDERT_OU=CB10_CN=RECIPIENTS_CN=CARROLP@orrick.com]
**Sent:** Thursday, October 31, 2002 1:29 PM
**To:** Hogben, Glynis
**Subject:** RE: Files to SRB

Yes - the files are being sent by pouch tomorrow.

Paul

-----Original Message-----
From: Hogben, Glynis
Sent: 31 October 2002 17:25
To: Carroll, Paul
Subject: FW: Files to SRB

Hi Paul

Have you managed to find this and send it?

Thanks
Glynis

-----Original Message-----
From: Maguire, C. Jane [mailto:jmaguire@hunton.com]
Sent: 29 October 2002 15:37
To: Carroll, Paul
Cc: Woods, Toni; Hogben, Glynis
Subject: Files to SRB

Hi Paul, will catch up with you soon, hope everything is a.o.k. with you! In the meantime would you please arrange to send to Steven/Toni in NY the following file:

Statek Corporation
General
Matter No. 65096.01

Toni, we did have a deed packet at one time but Fred (Johnston) requested it back; Fred had an office in Connecticut but Sandy Spillane I think worked out of Orange County. There is probably a card on the Roladex under Statek Corporation.

Thanks very much Paul - speak to you soon.

Jane

Jane Maguire
PA to Petar Kavanagh
Hunton & Williams
25 Farringdon Street
London
EC4A 4AB
Direct: + 44 (0) 20 7246 5736
E mail: jmaguire@hunton.com



STB 000588

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| IN RE: COUDERT BROTHERS LLP, | |
| Debtor. | Case No. 06-12226 (RDD) |

**DEVELOPMENT SPECIALIST INC.'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION OF STATEK CORPORATION FOR RECONSIDERATION OF THIS COURT'S ORDER DISALLOWING STATEK'S CLAIM # 239**

**STERN TANNENBAUM & BELL LLP**
380 Lexington Avenue
New York, New York 10168
(212) 792-8484

*Attorneys for Development Specialists, Inc.*

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE: COUDERT BROTHERS LLP, | : | |
| | : | Case No. 06-12226 (RDD) |
| Debtor. | : | |

**DEVELOPMENT SPECIALISTS INC.'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION OF STATEK CORPORATION FOR RECONSIDERATION OF THIS COURT'S ORDER DISALLOWING STATEK'S CLAIM # 239**

Development Specialists, Inc., as plan administrator for Debtor Coudert Brothers LLP ("Coudert"), respectfully submits this brief in opposition to the motion of Statek Corporation ("Statek") for reconsideration of this Court's Order, dated July 21, 2009 (the "Order") which disallowed Claim No. 239 filed by Statek (the "Claim").[1]

Summary of Argument

This Court should not reconsider the Order, or if it reconsiders the Order, it should adhere to its original decision and disallow Statek's Claim. At a minimum, the Court should hold the motion in abeyance to allow the parties to take limited discovery on the question of when Statek had sufficient knowledge of the facts for the applicable statute of limitations to run.

This Court previously disallowed Statek's Claim on the ground that it was time barred by operation of New York's borrowing statute which the Court applied in reliance on the Second Circuit's ruling in Gaston & Snow, 243 F.3d 601 (2d Cir. 2001), cert. denied, 534 U.S. 1042 (2001), and the Supreme Court's ruling in Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487

[1] Pursuant to Coudert's First Amended Plan of Liquidation, effective as of September 8, 2008, Coudert's Plan Administrator, Development Specialists, Inc., succeeded to its rights. For ease of understanding, we refer to the Debtor as Coudert. The Order includes, as Exhibit A, the transcript of the Court's May 18, 2009 bench ruling granting Coudert's motion to disallow the Claim. References below to that ruling will be as follows: "Order, Ts. p. __." The Order is Document No. 1207 on the Bankruptcy Court docket.